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APR 2

CHARLES E.

IN THE

Supreme Court of the United States.

OCTOBER TERM—1929.

No. 452.

RICHBOURG MOTOR COMPANY,

Petitioner,

—against—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW

No opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court is reported in 34 F. (2nd) 38, and may be found in the record (p. 15).

QUESTION PRESENTED

May proceedings be maintained for the forfeiture under R. S. 3450 (26 U. S. C. A., 1181) of an automobile seized by a Prohibition Officer while being used to transport intoxicating liquor under circumstances which indicate a violation of Section 26 of the National Prohibition Act?

Both the District Court for the Western District of North Carolina and the Circuit Court of Appeals for the Fourth Circuit answered this question in the affirmative. Petition for certiorari was filed October 21, 1929, and certiorari was granted by this Court December 2, 1929.

Statutes Involved

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act. Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> Sec. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed,

and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the same, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in any other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

R. S., Sec. 3450, 26 U. S. C. A., Sec. 1181:

SEC. 3450. REMOVING AND CONCEALING ARTICLES WITH INTENT TO DEFRAUD UNITED STATES OF TAX—

FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors which may be forfeited under the provisions of this

Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

STATEMENT

The facts are succinctly stated in the *per curiam* opinion of the Circuit Court (R. 15) as follows:

> "On February 22nd, 1927, the automobile in question was being operated by a Mrs. Bryson, who with two companions, *was driving therein.* A prohibition enforcement officer *stopped them* and, upon searching the car, found more than twelve gallons of whiskey. He thereupon took the car into his possession and arrested the occupants, who were bound over to court by a United States Commissioner on a charge of violating the National Prohibition Act. The United States attorney, however, did not proceed under the National Prohibition Act, but sent a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the car itself under Section 3450. An intervening petition claiming the car was filed by the Richbourg Motor Company, the innocent holder of an unsatisfied purchase money lien thereon, but the District Judge ordered it forfeited and the motor company has appealed." (Italics ours.)

From the record (R. 5) it appears that on or about February 22, 1927, W. W. Owens, a Federal Prohibition Officer, seized Ford coupe No. 14444150, from Ruth Bryson, H. C. Collins and Jessie Neal under the following circumstances: *The officer saw the automobile proceeding on the road and was suspicious of the car because he knew Mrs. Bryson, one of the occupants. He watched*

for the car and as it came back stopped it on the main highway. Finding liquor in the car upon investigation, he seized the automobile and arrested the three persons in the machine, taking them before the United States Commissioner, where they were charged with transporting whiskey in violation of the Prohibition Act (R. 6).

The United States Attorney thereafter obtained a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the automobile under Section 3450. An intervening petition was filed by Richbourg Motor Company, which had sold the machine to Mary Hunnicutt, under a conditional sales contract, after an investigation which disclosed to Richbourg Motor Company that Mrs. Hunnicutt was a reliable and law abiding woman, and that there was no information or suspicion that she was engaged in the violation of any law or had ever engaged in the traffic of intoxicating liquor (R. 6-7). The unpaid balance under the conditional sales contract at the time of the seizure was $417.00 (R. 7).

Argument

Proceedings in forfeiture of automobiles used in the transportation of intoxicating liquors must be instituted under Section 26 of the National Prohibition Act and may not be maintained under Section 3450 of the Revised Statutes.

A

Section 26 is in direct conflict with, and as to a case involving a violation of both, has repealed Section 3450.

Let us assume a case where a person is apprehended

in such circumstances that violation of both Section 26 and Section 3450 is indicated. Indeed, such is the case at bar, for while the facts indicated deposit and concealment, that is violation of Section 3450, and the car was proceeded against under that section, they also indicated transportation, that is violation of Section 26.

The United States contends that under such conditions it may elect to invoke either section for the forfeiture of the automobile. We must concede the right to use Section 3450 unless it has become inoperative by virtue of an implied repeal or unless the right to elect may not in such a case be exercised.

That Section 3450 continues in effect generally may not be denied. This Court has so held in the case of *United States* v. *One Ford Coupe Automobile* (272 U. S. 321). Does it, however, continue to be applicable where a violation of Section 26 of the National Prohibition Act as well as of the Internal Revenue Section is indicated?

Section 5 of the Willis Campbell Act (27 U. S. C. A. 3) provides that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor and all penalties for violation of such laws that were in force on October 28, 1929, shall be and continue in force as to both beverage and non-beverage liquor, *except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act.*

We are therefore put to the inquiry whether Section 3450 or any provision thereof is in conflict with Section 26 of the Prohibition Act in a case involving violation of both.

In circumstances which indicate a violation of Section 3450, but not of Section 26, there is no such general conflict as to result in the repeal of Section 3450. Such

was the situation in the *Ford Coupe* case and Mr. Justice Brandeis in that case recites at length the reasons for holding that there was no general repeal of Section 3450.

The opinion in that case even went so far as to indicate that there was no apparent conflict where a violation of both statutes was involved. However, it must be remembered that the Court was considering a case involving a violation only of Section 3450 (see p. 10 of this brief). It would seem, therefore, that the pronouncement of the Court on that particular point must be considered *dictum* and subject to further consideration by the Court in the light of the argument here presented as to the mandatory requirements of Section 26, which do not appear to have received discussion by the Court in the majority opinion in the *Ford Coupe* case.

That under such conditions, that is to say, where a violation of both statutes is indicated, there is a direct conflict between the statutes becomes evident upon analysis of the provisions of Section 26.

The provisions of Section 26 require:

(a) that upon an officer discovering that intoxicating liquor is being illegally transported or illegally possessed it shall be his duty to

1. Take possession of the automobile.
2. Arrest the person in charge thereof.
3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) that the Court, upon conviction of the person, shall

1. Order the liquor destroyed.
2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) that the officer carrying out the order of sale of the Court shall

1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which are established by intervention or otherwise as being *bona fide* and existing in favor of one who had no notice of the proposed illegal use of the vehicle.

In short, the section is mandatory in its statement as to the duties and the obligations of the arresting officer and the Court, *whenever* there shall be discovered a violation of Section 26. The arresting officer, where violation of this section and a prior statute are both indicated, may not elect which remedy he will pursue, the United States Attorney may not so elect and the Court may not. Indeed, there may be no executive or judicial election, for as Mr. Justice Butler has pointed out in his dissenting opinion in the *Ford Coupe* case, the law, that is, Section 26, makes the election.

If Section 26 is mandatory, if it permits no recourse to Section 3450, does it not follow that in a case indicating a violation both of Section 26 and of Section 3450 the two provisions are in direct conflict and that as to such a case Section 3450 has not been saved by the Willis Campbell Act.

B

THE OPINIONS OF FOUR OF THE JUSTICES OF THIS COURT SUPPORT PETITIONER'S VIEW.

The point at issue in this case has been referred to but not decided in three cases heretofore before this

Court. These are in the order of their consideration by this Court: *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321; *Port Gardner Investment Co.* v. *United States,* 272 U. S. 564; *Commercial Credit Co.* v. *United States,* 276 U. S. 226.

In the *Ford Coupe* case the Court, referring to the issue here involved, stated at page 333:

> "The claimant contends that, as applied to intoxicating liquors, §3540 and §26 are alternative remedies; and may not be employed cumulatively. Section 26 commands that when a person is discovered in the act of transporting, by means of a vehicle, intoxicating liquors in violation of the law, the officer shall take possession of the vehicle and shall arrest the person in charge thereof; that the person shall be proceeded against for the violation; that, pending the proceeding against him, the vehicle shall be surrendered to the owner upon giving bond to return it to the custody of the officer on the day of the trial to abide the judgment of the court; that, in case of conviction of the person, the vehicle shall be sold under conditions and in a manner prescribed; that the proceeds remaining after paying the expenses shall be paid over to lienors innocent of wrong doing; and that, unless and except so far as there are such lienors or others entitled thereto, the net proceeds shall be paid into the Treasury of the United States. The claimant insists not only that the government must elect between §26 and §3450, but that the commencement of proceedings under §26 bars a resort to §3450.
>
> *The case at bar does not present any conceivable question of cumulative remedies or of election.* While the second sentence in §26 uses

the words 'transported or possessed', the context makes it very plain that the possession intended is possession in transportation. *Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used.*" (Italics ours.)

Accordingly, the Court did not pass upon the issue. Indeed the Court stated that the sole question for decision in the *Ford Coupe* case was whether an automobile which was seized by a prohibition agent may be forfeited under Section 3450 if it was being used for the purpose of depositing or concealing tax unpaid illicit liquors with the intent to defraud the United States of the taxes imposed thereon.

However, Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case, observed:

> "I agree that the Willis-Campbell Act requires Section 3450 of the Revised Statutes and Section 26 of the National Prohibition Law to be so construed as to stand together *in so far as they are not in direct conflict.*
>
> I agree also that there conceivably may be a deposit or concealment of illicit liquor in an automobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of §26 and to that extent the two sections are not in conflict. *But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict, in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law with intent to defraud the*

> *United States of the tax. In that case, §26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section.* In that event Section 26 saved the interest of the innocent owner or lienor from the forfeiture required by Section 3450. *It appears to me that the conflict in such a case is direct and that Section 26 by its terms is controlling."* (Italics ours.)

In the dissenting opinion in the *Ford Coupe* case Mr. Justice Butler did not follow the majority of the Court in failing to consider the case as one involving a violation of Section 26, stating at page 344:

> "The opinion proceeds on the theory that transportation of whiskey in the automobile is not shown outside the claim of the Garth Motor Company. And it is held that, the dismissal being set aside, hearing on the question whether Killian was transporting the whiskey may be had in the lower court. It seems to me the litigation need not be so delayed, and that the important question pressing for decision should be decided now",

and considering this important question, deemed in 1926 to be pressing (and remaining in 1930 still undec'ded), Mr. Justice Butler goes on to state:

> "When the information was filed, the court issued a writ of attachment, commanding the marshal to attach the automobile 'which is now being held by Edgar N. Read, acting prohibition director', to detain it until the further order of the court and to give notice to the claimant. The marshal made his return that he had executed the writ by handing a copy to Acting Director Read and by seizing the automobile. December 6, 1923,

the claimant filed a motion to quash the libel. April 14, 1924, it filed its claim, alleging that the title to the automobile which was seized while being used by Killian 'in and about the unlawful transportation of intoxicating liquors' was in the company, subject to a conditional sales contract, and gave the bond provided for in §26, which was approved by the District Judge. The motion to quash was sustained and the libel was dismissed. The District Judge filed no opinion. The Circuit Court of Appeals affirmed the judgment. 4 F. (2nd) 528. In its opinion that court said: 'The position now taken by the government in this case is that the interest of an innocent owner or lien holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder of a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it by someone who had the intent to defraud the government of its internal revenue tax.' And the court held that §3450 is superseded by §26 in so far as there is conflict between them. It dealt with the case as one involving a violation of §26.

I think the court's interpretation of the record was right. The prohibition agent discovered Killian in possession of an automobile containing 27 quarts of illicit whiskey in violation of the National Prohibition Act. The agent seized the vehicle; and, as it was his duty to do so, it must be found that he also seized the whiskey. The prosecution of Killian was commenced by filing complaint charging him with the crime of *illegal*

possession in violation of that act. The facts stated make out 'transportation'. * * * I am of the opinion that the decree should be affirmed. * * *

Section 26 directs the proceedings to be taken in respect of the vehicle 'whenever intoxicating liquors transported or possessed illegally shall be seized by an officer'. The libel brings the case within the words and meaning of the clause just quoted."

The dissenting opinion of Mr. Justice Butler received the concurrence of Mr. Justice McReynolds and Mr. Justice Sutherland.

In the *Port Gardner Company* case six questions were presented by the Certificate. The fifth question was: "Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under Section 26 of the Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?"

The opinion of the Court delivered by Mr. Justice Brandeis considering the fifth question stated at page 566:

"The disposition of the automobile prescribed in §26 became mandatory after Neadeau's conviction; and being inconsistent with the disposition under §3450 necessarily precluded resort to proceedings under the latter section. Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.

We need not determine whether the mere commencement of a proceeding under §26 constitutes an election. Nor need we give specific answers to the other questions asked, since the certificate

does not disclose any reason why the sale of the automobile, subject to the interests of innocent parties, should not have been ordered by the District Court after the conviction of Neadeau."

So that as in the *Ford Coupe* case, the question we are interested in remained undecided.

In a concurring opinion, however, Mr. Justice Butler again, as in the *Ford Coupe* case, regretted the fact that the decision of the Court was qualified and restricted. The concurring opinion is short and follows in full:

> "I agree that the answer to question 5 should be in the affirmative.
>
> In the opinion it is said, 'Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.' This means prosecution and conviction of the driver constitute an election to proceed against the vehicle under §26 and prevent forfeiture under §3450. The answer is enough to guide the Circuit Court of Appeals in this case. But it leaves open the question which is not decided in No. 115. *The substance of that question is whether the prohibition officer discovering one in an act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle as there directed. I think he has no more right to ignore the command that he has to let the liquor and offender go. The law makes the election.* (Italics ours.) I regret that this Court's answer is so qualified and restricted. Section 26 is not so restrained.
>
> I am authorized to say that Mr. Justice Stone concurs in this opinion."

The final case considered by this Court, in which the issue here involved was raised but not decided, was that of *Commercial Credit Company* v. *United States*, 276 U. S. 226. In that case proceedings to forfeit an automobile under Section 3450 were brought after one Campbell, in charge of the automobile, having been prosecuted in the District Court under the National Prohibition Act on charges of unlawful possession and transportation of liquor, had pleaded guilty to unlawful possession, whereupon the Government had dismissed the charge of unlawful transportation.

The Circuit Court of Appeals, on the theory that Campbell's conviction of unlawfully possessing liquor was under Section 3 of Title II of the Prohibition Act, and therefore did not entail a disposition of the car under Section 26 of that title, held that the Government was at liberty to proceed under Section 3450 for the forfeiture of the automobile.

This Court reversed the decision of the Circuit Court of Appeals because the facts indicated that the possession, as to which he had pleaded guilty, was possession in transportation and that therefore under the doctrine of the *Port Gardner Investment Company* case the disposition of the car under Section 26 became mandatory after the conviction.

However, the Court in this *Commercial Credit* case, as in the *Port Gardner* case and in the *Ford Coupe* case, did not avail itself of the opportunity to answer the question propounded by Mr. Justice Butler in his concurring opinion in the *Port Gardner* case. The opinion delivered by Mr. Justice Sanford recites at page 231:

> "The claimant states that the question here presented is that which was referred to in a con-

curring opinion in the *Port Gardner Investment Company* case, namely, 'whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle as there directed', and on that assumption the arguments have been largely directed to the question whether, whenever an officer discovers a person in the act of transporting intoxicating liquor in a vehicle, the provisions of §26 become mandatory in such sense as to furnish the exclusive remedy for the forfeiture of the vehicle. But, since it appears that the officer in fact seized the vehicle and arrested Campbell, who was in fact proceeded against under the Prohibition Act, the question of the officer's duty to proceed under §26 is not here involved."

CONCLUSION.

Accordingly we have the unique situation of presenting to this Court for consideration an issue as to which in various cases four of the Justices have already expressed views sustaining the argument of the petitioner. This circumstance, we submit, of itself is a compelling argument in support of petitioner's position.

Petitioner's contention is supported not alone by the cumulative effect of the judicial expressions of the several Justices of the Court to which we have referred, but as well by statute, by logic and by the dictates of fairness and justice. It is supported by statute in that the provisions of the National Prohibition Act, being inconsistent with certain provisions of the Revenue Law, are declared to have been repealed in favor of the former. It is supported by logic in that it is unreasonable to

assume that the Congress enacting a Prohibition Act in 1919 should have intended that a provision deliberately included in that Act be discarded for enforcement purposes in favor of an Act of 1866, the current use of which is so obviously designed to accomplish the general intent of the discarded section, while at the same time making nugatory and unavailable those provisions of that section which protect innocent lien holders. The Prohibition Act was designed to correct an evil and was never intended to be the instrument with which to visit forfeitures and penalties upon innocent persons. It is supported by fairness and justice since the drastic remedy of the Revenue Law is directed not alone against the transgressor, but against the innocent lienor, whose rights are so clearly intended to be guarded by the National Prohibition Act.

It is, we believe, a fair assumption that the conditions surrounding the passage of the Revenue Act were so different from those surrounding the passage of the Prohibition Act that this Court is justified in taking judicial notice of the differing conditions. The commercial and banking contacts in the period of 1866 were direct and simple and it is fairly inferable that vendors, vendees and mortgagees had opportunity to have reasonable notice of their respective purposes and intentions. We are now in a totally different age, in which such parties know nothing of each other and in most transactions do not even meet. Commercial and banking transactions are impersonally conducted, in fact cannot be conducted in any other manner. Trade, commerce and banking must be facilitated with rapid and intelligent service. This is fundamentally the age of transportation—the motor age. The mass production of motors and its complement, mass consumption, required

the creation of coordinated banking facilities for consumers, as the majority of motors are sold on credit with supporting liens on the motors so sold (see Prof. Edwin R. A. Seligman, MacVickar Professor of Political Economy, Columbia University, on "The Economics of Installment Selling"—Harper & Bro., 1927). Great banking institutions have arisen specializing in this type of credit. Subtract the credit sales of motors and this great industry would shrink in volume to its great damage and that of related and supporting industries. The framers of the Prohibition Act in drafting Section 26 must have had in mind the equitable protection of the banking institutions which in good faith, lawful purpose and innocence of conniving at infractions of law, finance motor lien paper to the extent of billions of dollars per annum. What good purpose can be subserved by visiting losses upon them by invoking the operation of a statute whose harshness was so obviously intended to be negatived by the terms of Section 26.

It may be pertinent to indicate to this Court that those who have suffered from the promiscuous use of Section 3450, bankers and automobile merchants, have no quarrel with the National Prohibition Act nor with its strict enforcement. They neither condone the offenses against it nor approve or support the offender. Great care is employed to finance only sound risks and to prevent automobiles from coming into possession of bootleggers, rum runners and other improper persons.

These forfeiture proceedings have resulted from those instances where, notwithstanding the care exercised to prevent it, cars have been purchased, generally through subterfuge, by those unlawfully engaged or those who purchase with intent of lawful use and later determine to engage in illegal acts.

Your petitioner, speaking for the automobile merchants and the special banking corporations which are interested, respectfully submits that justice cannot give countenance to permitting the resurrection of an ancient statute for the harsh enforcement of a modern statute to the injury of innocent persons whose rights that modern statute itself jealously preserves.

> "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice'."

Mr. Justice McReynolds, dissenting in *Carroll* v. *United States*, 267 U. S. 132, at 163.

It is submitted that the decree of the United States Circuit Court of Appeals for the Fourth Circuit should be reversed.

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

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This brief is filed in reply to the brief of the respondent.

I

The word "shall" as employed in Section 26 of the National Prohibition Act should be construed in a mandatory and not a discretionary sense.

Respondent contends that the word "shall" should be construed not in its usual mandatory sense of "must" but in the discretionary sense of the word "may".

While it is true that the word "shall" may sometimes be read to mean "may", it should not so be construed when used in a statute confiscatory or penal in its nature or where a public or private right would be impaired by such construction. See *Madison* v. *Daley*, 58 Fed. 751, at page 753, where the Court stated:

"Where the public or third persons have a claim *de jure* that the act shall be done, it is imperative and will be construed to mean must".

The Espionage Act (June 15, 1917, c. 30, 40 Stat. 217) contained a forfeiture provision somewhat similar to Section 26. The provision was considered and a similar use of the word "shall" construed in *United States* v. *267 Twenty-Dollar Gold Pieces,* 255 Fed. 217. The opinion recites:

> "Concisely stated, the act provides that after seizure, within 10 days, the person making the seizure shall on oath or affirmation apply to the District Judge for a warrant to justify the detention of the seized property, and, if the judge refuses to issue the warrant, or application therefor is not made within 10 days after the seizure, the property shall forthwith be restored to the owner or person from whom seized.
>
> A statutory power to divest the owner of title to the property is here enacted, and I think the mode of procedure prescribed by the act creating this power is complete, and must be strictly construed and that the provisions are mandatory as to the essence of the thing to be done. *Franklin Glass Co.* v. *White,* 14 Mass. 286; *Monk* v. *Jenkins,* 2 Hill's Eq. (S. C.) 9.
>
> A new power was here created, and means to execute it provided. The statute expressly says he shall apply for a warrant within ten days after seizure, and, on failure, shall forthwith restore to the owner the property seized.
>
> 'Where a statute declares a thing shall be done, it is a peremptory mandate.' Bouvier's Dictionary.

> 'Shall', ought undoubtedly to be construed as meaning 'must', for the purpose of sustaining or enforcing an existing right." *W. W. R. Co.* v. *Foley,* 94 U. S. 100, at page 103 (24 L. Ed. 71).
>
> "While it is said in *Railroad Co.* v. *Hecht,* 95 U. S. 168, 24 L. Ed. 423, that as against the government, the word 'shall', when used in statutes, is to be considered as 'may', unless the contrary intention is manifest, here the contrary intention is manifest."

Attentive examination of Section 26 fortifies petitioner's construction of the word "shall" in the injunctive sense of "must".

If the word "shall" as used in Section 26 were given the discretionary interpretation urged by respondent we would have the absurd result of a statute providing that "when the Commissioner, his assistant, inspectors or any officer of the law shall discover any person in the act of transporting in violation of the law intoxicating liquors in any wagon, automobile, water or air craft or other vehicle, it *may* be his duty to seize any and all intoxicating liquors found therein being transported contrary to law".

It is obvious that such an interpretation will not lie. Indeed if the wording were "he shall seize", instead of "it shall be his duty to seize", the word "shall" would obviously require a mandatory interpretation. But the very use of the term "it shall be *his duty* to seize", eliminates any possible doubt as to whether Congress intended that the provision should be mandatory.

The next sentence of Section 26, if given a discretionary construction, would require the following reading: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he *may*

take possession of the vehicle and team or automobile, boat, air or water craft or any other conveyance and *may* arrest any person in charge thereof".

This construction is illogical since it would permit an officer discovering a violation of the law to exercise his discretion as to whether or not to arrest the person unlawfully engaged.

Reading further in Section 26 it becomes evident that the very next sentence requires beyond all question a mandatory and not a discretionary construction of the preceding sentence. For *it assumes that the arrest shall have been made,* to wit, "* * * and shall arrest any person in charge thereof. Such *officer shall at once proceed* against the person arrested *under the provisions of this title* in any court having competent jurisdiction". CAN THIS POSSIBLY MEAN THAT THE OFFICER *MAY* AT ONCE PROCEED? OR THAT HE MAY PROCEED UNDER SOME OTHER STATUTE?

The respondent has sought to direct the attention of the Court to the effect on other statutory provisions of a mandatory interpretation in the case at bar, of Section 26. It may not necessarily follow that the construction sought to be placed on this section would preclude the use by the Government of the other statutes referred to in the brief of the respondent. But even if that result were to follow the fact remains that Section 26 must be construed as enacted. If some of the results of the enactment prove to have been unanticipated, that is a matter which should properly concern Congress. See *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 224, 233.

II

The mandatory requirements of Section 26 provide the conflict between Section 26 and Section 3450 upon which petitioner relies.

The brief of respondent at page 11 recites that "the sole basis of petitioners' contention of conflict and of the decisions relied on by them is that Section 26 saves the interests of the innocent lienor or owner from the forfeiture required by Section 3450".

Petitioner in the case at bar has not apparently made clear to respondent the basis of petitioner's contention of conflict.

Petitioner contends that there is a conflict between Section 26 and Section 3450 by reason of the fact that Section 26 by mandatory language requires that proceedings must be brought under Section 26 whenever a violation of Section 26 is discovered. Being mandatory the section excludes recourse to the earlier enacted Section 3450, where a violation of both sections is discovered. Excluding recourse to Section 3450 in such a case it is petitioner's contention that Section 26 is therefore in conflict with Section 3450.

The brief of respondent urges that if an election between the statutes may be made the United States Attorney and not the arresting officer shall determine the election. This issue is not embraced in the specification of errors now before the Court.

It is the practice upon making an arrest for the officer to take the person arrested before a United States

Commissioner. It is respectfully submitted that the charge which is made before the United States Commissioner is the charge which the Government should be deemed to have elected. In short, it is not a question of who should make the election but of what election is in fact made.

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